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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, p. 1a) is reported at 477 F. 2d 930. The Court of Claims' Order denying the parties' motions for reconsideration (App. B, *infra*, p. 13a) is unreported.

JURISDICTION

The opinion of the Court of Claims (App. A, *infra*, p. 1a) was entered on May 11, 1973, and a motion for reconsideration was denied (App. B, *infra*, p. 13a) on September 28, 1973. On January 3, 1974, the Chief Justice extended the time within which to file a peti-

tion for a writ of certiorari to January 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

1. Whether the Court of Claims exceeded its jurisdiction under the Wunderlich Act by deciding a question of liability and by ordering the responsible contract appeals board to adjudicate the resultant damages, notwithstanding (1) that the contractor had never pursued the exclusive administrative remedy provided by the Disputes clause of its government contract, (2) that the 30-day period for filing an administrative appeal provided by the contract had expired more than five years before the filing of the petition in the Court of Claims, and (3) that the Government had not yet filed an answer to the petition or had any other opportunity to contest the factual allegations therein.

STATUTE INVOLVED

The Act of August 29, 1972, Public Law 92-415, 86 Stat. 652, amending 28, U.S.C. 1491, with respect to the Court of Claims provided in pertinent part:

> In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

STATEMENT

During the period 1964–1966, the William Green Construction Company, Inc. ("Green"), entered into three separate construction contracts with the United States, through the General Services Administration

("GSA").[1] The contracts called for the construction of, respectively, a dormitory on the campus of Howard University (the "Howard" contract), a post office and federal office building in Portsmouth, New Hampshire (the "FOB" contract), and a training school facility in West Virginia (the "Training School" contract). In 1966, a dispute arose between Green and GSA concerning the specifications for the Howard contract. Green maintained that the specifications were defective and impossible to carry out, and therefore refused to proceed with construction of the building. The contracting officer ruled that Green's refusal to go forward was unjustified, and terminated that contract pursuant to its Default clause (App. A, *infra*, pp. 1a–2a).[2]

[1] This statement of facts is based upon the opinion of the Court of Claims and the two decisions of the GSA board of contract appeals, *Appeal of William Green Construction Co.*, 68-1 BCA ¶ 6883; *Appeal of William Green Construction Co.*, 71-2 BCA ¶ 9116. Since the opinion of the Court of Claims arose on the Government's motion to dismiss the petition, there has as yet been no factual finding as to whether the Government's wrongful termination of the Howard contract caused any of the damages claimed. Indeed the court's resolution of this factual question in the context of a motion to dismiss is one of the bases of this petition for a writ of certiorari (see *infra*, pp. 13–14).

[2] Paragraph 5 of the Howard contract (Standard Form 23A, April 1961 ed., General Services Administration) as modified on a page entitled "Modification of General Provisions" (Standard Form 23–A) provides:

"5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

"(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any

extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

"(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

"(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

"(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

"(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

"(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the con-

Thereafter, according to the allegation in Green's petition in the court below, GSA advised Green that GSA intended to set off, against amounts otherwise payable to Green under the other two contracts, the liquidated damages and excess completion costs arising out of the termination of the Howard contract. Green contested GSA's right of set-off, alleging that GSA's termination of the Howard contract had been improper, and that a set-off would not only make it financially impossible for Green to complete the FOB and Training School contracts, but moreover would put Green out of business altogether. When GSA al-

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tract), notifies the Contracting Officer in writing of the causes of delay.

"The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

"(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled DISPUTES."

[The Howard contract does not contain a clause providing for termination for the convenience of the Government.]

legedly refused to disclaim its right to set off the amounts involved, but before any set-off was actually imposed, Green discontinued work on the FOB and Training School contracts, and the contracting officer subsequently terminated those contracts pursuant to their respective Default clauses (App. A, *infra*, p. 2a).[3]

The Howard, FOB and Training School contracts all contained the standard "Disputes" clause [4] which,

[3] The Default clauses in the FOB contract (as modified) and the Training School contract were identical to the Default clause contained in the Howard contract (as modified).

[4] Paragraph 6 of the Howard contract (Standard Form 23-A, April 1961 ed., General Services Administration) provides:

"6. DISPUTES

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with

inter alia, affords a contractor the right to appeal a default-termination decision to the appropriate government contract appeals board within thirty days of termination, but which further provides that the decision of the contracting officer terminating the contract, if not appealed within thirty days, is final and conclusive.

Green timely appealed the termination of the Howard contract, and in the Howard appeal, Green also asserted claims for unliquidated damages for breach of contract. The GSA board of contract appeals held in 1968 that Green's claim under the Howard contract must be limited to only that recovery prescribed by the Howard contract for improper default-terminations, *i.e.,* an equitable adjustment, and, accordingly, the Board dismissed from the Howard appeal Green's breach of contract claims. *Appeal of William Green Construction Co.,* 68–1 BCA ¶ 6883.[5] Subsequently, in 1971, the GSA board of contract appeals, pursuant to the Government's stipulation that it had erroneously cancelled the Howard agreement, ruled that the Howard contract had been improperly terminated and remanded the matter to the contracting officer for the required equitable adjustment. *Appeal of William Green Construction Co.,* 71–2 BCA ¶ 9116. Green never

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the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

[5] See note 2, par. 5(e), *supra,* p. 5.

independently appealed the validity of the default-termination of the FOB or Training School contracts in the manner prescribed by the Disputes clause.

In 1972, Green brought this independent action in the Court of Claims claiming damages on the theory that GSA had breached the Howard, FOB and Training School contracts. As the basis of its claims on the FOB and Training School contracts, Green alleged that the Government had compelled it to discontinue performance of those contracts by threatening to set off, against amounts payable thereon, the losses incurred by the Government on the Howard contract (App. A, *infra,* pp. 3a–4a).

In ruling on the Government's motion to dismiss the petition, the court recognized that the Disputes clause procedure of the contracts was applicable and that the exclusive remedy available to Green was an appeal to the GSA contract appeals board, since "[t]hat was the channel expressly marked out by the contract and it should have been followed" (App. A, *infra,* p. 5a). The court dismissed the petition as it applied to the Howard breach of contract claim, noting that the equitable adjustment Green was then receiving administratively was all it was entitled to. (App. A, *infra,* p. 5a). However, instead of dismissing the petition as it pertained to the FOB and Training School contracts, the court ordered the board to hear Green's appeal, notwithstanding the fact that the 30-day period provided by the contracts for an administrative appeal had expired in 1966, more than five and a half years before the 1972 filing of Green's petition in the Court of Claims. In support of this

action the court held that it had the power to remand a case to the board with directions to process an administrative appeal regardless of its timeliness (App. A, *infra*, p. 9a). Further, notwithstanding that the case was before it only for consideration of the Government's motion to dismiss and that no evidentiary proceedings had ever taken place, the court found that the GSA's threat of set-off induced Green to discontinue performance and that GSA had wrongfully terminated the FOB and Training School contracts.[6] The court therefore remanded the case to the appeals board to determine only the actual recovery due Green.

REASONS FOR GRANTING THE WRIT

The decision below constitutes an erroneous expansion by the Court of Claims of its own jurisdiction under the Wunderlich Act (41 U.S.C. 321, 322), which seriously threatens the integrity of the administrative appeals procedure, and seriously impairs the government's ability to settle disputes under its contracts promptly and conclusively.

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[6] In this respect the court stated (App. A, *infra*, p. 10a):

"There has, as yet, been no decision that the termination of the FOB agreement was improper, but we think that on the undisputed facts there is no doubt that it was, and we now so hold as a matter of law since the board could not validly decide otherwise. All must now accept the Howard termination as incorrect; Green was not in default on that project and the default-termination was erroneously made by the contracting officer. There were, accordingly, no liquidated damages and no excess construction costs which could properly be offset against the FOB and Training School contracts. That threats to offset were nevertheless made is undisputed and indisputable. The connection is also clear between those threats and Green's stopping work on the FOB and Training School projects."

In *United States* v. *Anthony Grace & Sons*, 384 U.S. 424, this Court ruled that the jurisdiction of the Court of Claims under the Wunderlich Act, to review disputes covered by the Disputes clause of government contracts, is limited to those cases where the contractor has exhausted its administrative remedies, and has thus obtained an administrative determination of the merits of its claim. As this Court has stated, review by the Court of Claims on a question arising under a Disputes clause "must rest solely on consideration of the record before the department." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714. The decision of the court below represents a serious departure from this jurisdictional principle in holding that (1) the contractor need not exhaust his administrative remedies within the period mutually agreed upon in the contract, and (2) that the court has authority to decide the merits of the contractor's claim in the absence of a previous administrative determination of that question, and indeed in the absence of any factual record or findings on which to base the court's decision. Review by this Court is therefore warranted.

1. In an unbroken line of cases extending over half a century, this Court has repeatedly emphasized that a government contractor is bound by his agreement to observe the remedial provisions set forth in the contract, and that the courts lack power to grant any relief in derogation of those provisions. See, *e.g.*, *Kihlberg* v. *United States*, 97 U.S. 398; *Sweeney* v. *United States*, 109 U.S. 618; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U.S. 549; *United States* v. *Moorman*, 338 U.S. 457; *United States* v. *Carlo Bianchi &*

Co., supra. Thus when, as here, a contractor has failed to pursue the remedies stipulated in his agreement with the Government, the courts are obliged to "outlaw his claims, whatever may be their equity." *United States* v. *Holpuch Co.,* 328 U.S. 234, 240; *United States* v. *Blair,* 321 U.S. 730; *United States* v. *Callahan Walker Co.,* 317 U.S. 56.

The court below held that it possessed jurisdiction to compel the appeals board to give the contractor a "second chance" (App. A, *infra,* p. 9a) to assert its claims before the board, notwithstanding that the 30-day period for taking such an appeal had expired and the contractor has been afforded a full opportunity to pursue an appeal within the stipulated time. In so holding, the Court of Claims has fashioned a rule which threatens a particularly significant aspect of the remedial mechanism set forth in government contracts. The manifest purpose of the 30-day appeal period is to promote the security of transactions by insuring that the decisions of contracting officers, if not contested within the agreed-upon period, may be regarded as no longer subject to dispute. This policy therefore permits government agencies to fix a date certain upon which contractual matters, once potentially subject to challenge, may be treated as finally closed.[1]

[1] The decision below is thus also inconsistent with court of appeals holdings that contracting officers' determinations become final if a timely appeal is not taken. *United States* v. *Hammer Contracting Corporation,* 331 F. 2d 173 (C.A. 2); *United States* v. *Ulvedal,* 372 F. 2d 31 (C.A. 8); *United States* v. *Peter Kiewit Sons' Co.,* 345 F. 2d 879 (C.A. 8).

The court below did not conclude that the appeal procedure here was inadequate or unavailable. Rather, in the court's view, Green's omission to pursue a timely appeal was sufficiently excused by Green's allegation that, in its challenge to an entirely different agreement (the Howard contract), Green had sought to recover consequential damages for the losses on the FOB and Training School contracts. There are, however, many circumstances in which a contractor with a colorable claim can supply a plausible reason, similar to that presented here, for its failure to observe the terms of the contract. If such reasons are now to be entertained as a basis for determining whether contractual issues should be reopened years after the prescribed period for asserting claims under the contract has expired, the principle of finality incorporated into the parties' agreement will be severely impaired.

2. As authority for its ruling in this case, the Court of Claims relied upon its earlier, more limited decisions,[8] and upon a recently enacted statute which permits the Court of Claims to remand cases to appeals boards "[i]n any case within its jurisdiction" (P.L. 92–415, 86 Stat. 625, *supra*). The jurisdiction of the Court of Claims, however, is limited by the Wunder-

[8] *Maney Aircraft Parts, Inc.* v. *United States*, 197 Ct. Cl. 159, 453 F. 2d 1260 (1972); *Monroe M. Tapper & Associates* v. *United States*, 198 Ct. Cl. 72, 458 F. 2d 66 (1972), where the court held that appeals boards have authority to waive the contractual appeal period.

lich Act, 41 U.S.C. 321, 322, which confers review authority upon the court only when the contractor has exhausted his contractual remedies by appeal to the contract appeals board—a prerequisite which Green did not meet here. *United States* v. *Anthony Grace & Sons, supra; United States* v. *Carlo Bianchi & Co., supra.* Thus, the purpose of the new statute was not, as the court's ruling implies, to abrogate the terms of the Disputes clause. Rather it was intended simply to cure the question left open in *United States* v. *Carlo Bianchi & Co.* as to whether the Wunderlich Act permitted the Court of Claims, in cases otherwise properly before it, to remand cases back to contract appeals boards in order to supplement a defective record.[9] 373 U.S. at 717–718. Accordingly, there is nothing in this new statutory enactment to support the Court of Claims' serious departure from long-established jurisdictional principles.

3. The Court of Claims used its waiver of the 30-day appeal period as a vehicle for a second equally serious incursion into the board's jurisdiction. Having first ordered the board to adjudicate Green's claim, the court proceeded to determine the merits of Green's claim prior to any administrative ruling having been made by the GSA contract appeals board, and in fact without the benefit of any evidentiary proceedings

[9] See, *e.g.*, H. Rep. No. 92–1023, 92d Cong., 2d Sess., p. 4, where the Congressional purpose to modify the *Bianchi* case in this respect is expressly stated.

having taken place.[10] The court held that the Government had wrongfully default terminated both the FOB and Training School contracts and, in connection with the holding, the court found that Green's failure to proceed with those contracts was caused by the contracting officer's "threat" to set off against those contracts, the Government's claims for liquidated damages and excess completion costs on the terminated Howard contract. These determinations by the court are in direct contravention of the doctrine set out in *United States* v. *Anthony Grace & Sons, supra,* and *United States* v. *Carlo Bianchi & Co., supra,* that the sole function of the Court of Claims in cases under the Wunderlich Act is to review decisions of contract appeals boards on the record compiled in the proceedings before such boards, and that the court is thus precluded from adjudicating the case *de novo.*

The Court erred even more fundamentally here, however, by making the foregoing determinations solely on the basis of factual allegations in the contractor's petition which the Government had not yet had an opportunity to contest and which the Government has a substantial basis for contesting and intends to contest if it is afforded an opportunity to do so. The Government's Motion to Dismiss for failure to state a claim explicitly stated (at p. 3) that "[t]he facts

[10] The case was before the court on the Government's motion to dismiss the petition for failure to state a cause of action upon which relief could be granted. The Government has never filed an answer to the petition.

as stated in the petition" were "assumed [to be] correct for the purposes of this motion only * * *." It pointed out (at p. 1) that the Government had not yet answered the petition. The Court of Claims' opinion ruling on the motion to dismiss deprives the Government of any opportunity to do so and "remands" the case to the board for administrative proceedings to be conducted in accordance with the court's determinations of what it called "undisputed facts" (App. A, *infra*, p. 10a). But the Government does wish to dispute those factual allegations and had no opportunity in the Court of Claims to "even hint that this stoppage was unrelated to, or had some cause other than, the menace of set-off" (*ibid.*).[11] The fact that, under other aspects of the court's decision, the parties would now have to undertake to contest those factual allegations so many years after termination of the contracts involved is obviously not the fault of the Government, but is, instead, a function of the court's other errors in the case. Indeed, the very staleness of the evidence to be considered underlines the importance of maintaining the principle that claims under the contract must be asserted within the time period, and in the manner, prescribed in the parties' agreement.

[11] The correspondence attached to the petition to which the court refers (App. A, *infra*, p. 10a, n. 6) is not the only correspondence in the Government's file, or the only potential evidence, which bears on the factual allegations in the petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
IRVING JAFFE,
Acting Assistant Attorney General.
ROBERT E. KOPP,
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JANUARY 1974.

APPENDIX A

In the United States Court of Claims

No. 124–72

(Decided May 11, 1973)

WILLIAM GREEN CONSTRUCTION COMPANY, INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY v. THE UNITED STATES

James V. Dolan, for plaintiff; *Stanley C. Morris, Jr.*, attorney of record. *Richard A. Behrens, Michael Malley* and *Steptoe & Johnson*, of counsel.

Judith Ann Yannello, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTION TO DISMISS THE PETITION

DAVIS, *Judge*, delivered the opinion of the court:

Three separate government construction contracts are interlaced in this case. In November 1964 plaintiff William Green Construction Company (Green) agreed with the General Services Administration to build a women's residence hall at Howard University in the District of Columbia (the Howard University contract). About the same time Green also contracted with GSA to construct a Post Office and Federal Office Building in Portsmouth, New Hampshire (the FOB contract). A year and one-half later, the same agency arranged with plaintiff Green to erect the National Training

School for Boys in Morgantown, West Virginia (Training School contract). Plaintiff United States Fidelity & Guaranty Company (USF&G) was the surety on the Howard University and FOB contracts; another company was surety on the Training School agreement. Green was also working, during this period, on three nonfederal projects on which USF&G was surety.

In 1965–1966, during performance of the Howard University work, the contractor and the defendant had a serious dispute whether certain of the government specifications were defective and impossible to carry out. When Green refused on that ground to go forward, the contracting officer terminated for default. Green challenged this determination, insisting that its inability to proceed was justified by the defects in the defendant's requirements.

In the discussions which followed, defendant indicated that it intended to set off, against amounts which would be owing on the other two of Green's federal contracts, the liquidated damages and excess completion costs assessable with respect to the just-terminated Howard University agreement. Green responded that such set-offs were improper—because the default-termination was unwarranted—and would make it financially impossible to proceed with completion of the other two contracts, and, more than that, the contractor's entire business would be destroyed. For this reason, Green and USF&G asked the GSA to isolate the Howard University dispute and not to impose set-offs, but the Government refused to make such a commitment.

Shortly after the Government had made it clear that it fully maintained its right of set-off, but before any set-off had actually occurred, Green informed GSA that, because of the threat to reduce payments on the other projects, it was financially unable to, and would not, proceed with the FOB and Training School contracts. These two agreements were then terminated by the Government for default. USF&G completed the FOB work, and apparently the other surety did the same for the Training School contract. Green likewise failed to complete the three nonfederal contracts it had, and went out of business.

Green appealed to the General Services Board of Contract Appeals from the default-termination of the Howard University contract, but it never sought review by the Board of the defaults with respect to FOB and Training School. The Howard appeal asked, not only for the conventional modern adjustment for an improper default-termination,[1] but also for damages for losses on FOB and Training School, as well as on the nonfederal projects, and for loss of Green's business as a whole. Because of the inclusion of these items of recovery, the Government moved the board to dismiss the appeal as for "breach of contract" and "unliquidated damages", beyond the board's authority. In 1968 the board partially granted this motion, dismissing all claims except that for an equitable adjustment under convenience-termination standards.

Later, in 1971, the parties stipulated before the board that Green "was not in default at the time it received notice of the termination [of the Howard University contract] and the Government concedes the termination for default was erroneously made by the contracting officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case." The GSBCA then found that the contractor's "right to proceed under the contract was improperly terminated for default", and remanded to the contracting officer to determine the equitable adjustment for the unreimbursed costs of performing the Howard work. The stipulation expressly provided that "any equitable adjustment under the contract shall not be prejudicial to [the contractor's] right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment." GSBCA No. 2114, 71-2 BCA ¶ 9116.

In 1972 Green and USF&G brought this action, alleging what we have thus far set forth, asking for the large damages (over $2,700,000) the board had dismissed from the Howard appeal, and claiming that those damages are recoverable on the theory that the United States breached all three of Green's federal contracts. Count I of the petition asserts the

[1] The Howard contract provided that, if the default-termination was erroneous, the contractor would be entitled to an equitable adjustment—the equivalent of treatment as a convenience-termination. *See infra.*

full claim as a breach of the Howard contract, while Count II bottoms the very same claim on alleged breach of the FOB and Training School agreements. Defendant has moved to dismiss the petition for failing to state any proper claim.

We think that the claimants do not have a "breach" claim against defendant on any of the three contracts, but that plaintiff Green does have a right to a convenience-termination type of equitable adjustment, under all three of them, and that such adjustments should be awarded administratively. We discuss the three agreements *seriatim*.

Howard University contract (*Count I*): The defendant's notice of default-termination of the Howard contract triggered the default-termination clause which provided that, if it was determined for any reason "that the Contractor was not in default under the provisions of this clause", or that "the delay was excusable", the matter was to be treated as a convenience-termination if the contract contained a convenience-termination article, and, if not, the contract was to "be equitably adjusted to compensate for such termination." We have held that the latter alternative calls for the general equivalent of a convenience-termination award. *General Builders Supply Co.* v. *United States*, 187 Ct. Cl. 477, 409 F. 2d 246 (1969).

It follows that when the GSBCA determined that Green's right to proceed was wrongfully ended, and remanded for an appropriate adjustment, the contractor received the maximum to which it was entitled under the contract. There is no present complaint as to the amount of the equitable adjustment, and plaintiffs do not contend that such an award can or should cover the types of consequential damage they seek here. The petition suggests, however, that a breach claim for a wrongful default-termination somehow survived for these additional items of recovery.

But it is very plain under our decisions that the administrative remedy is the only one available to the contractor. Green does not retain a "breach" claim, for an improper default, which can be brought in court and through which a supplemental award can be obtained. *See General Builders Supply Co.*, *supra*, 187 Ct. Cl. at 480 n.3, 409 F. 2d at 248 n.3; *G. C. Casebolt Co.* v. *United States*, 190 Ct. Cl. 783,

786-87, 421 F. 2d 710, 712 (1970). The exclusive remedy "under the contract" substitutes for the "breach" claim which would otherwise exist, and becomes the claimant's sole form of relief. The measure of recovery for a convenience-termination—costs incurred, plus a reasonable profit on work performed—is an adequate replacement for the common-law cause of action. *See infra.*

It is worth noting, in addition, that in any event the type of consequential damage for which plaintiffs now press could not be obtained under Count I even if there were no such default-termination clause in the contract and this suit were properly one for common-law breach for wrongful cancellation of the Howard University pact. On the face of the petition it was not the wrongful termination itself which caused either Green's inability to proceed on the other two federal contracts, or the stoppage of work on the three nonfederal projects, or plaintiff's eventual going-out-of-business, but the subsequent and separate threat of set-offs against payments owing on the FOB and Training School projects. Whatever else those threats may have been, they were in no way violations of the Howard contract, nor were they directly or integrally linked to the Howard default termination. They were, instead, independent acts of the Government directed to the other two federal projects.

Accordingly, defendant is quite right that Count I fails to state any claim at all and must be dismissed *in toto*. The equitable adjustment which Green is receiving, through the administrative proceedings, is all that it merits with respect to the Howard contract.

FOB contract (Count II): A. Even if the default-termination of the FOB agreement was invalid, Green should have appealed to the GSBCA, just as it sought review of the Howard termination. That was the channel expressly marked out by the contract and it should have been followed. If the FOB termination was improper, an equitable adjustment would be made under that contract which embodied the same default-termination form as the Howard agreement.

Plaintiffs try to avoid this conclusion by a number of arguments which we must reject. The first is that the claim in Count II is not for wrongful termination but for anticipa-

tory breach of the FOB contract, through refusal to make progress payments. This is but a choice of phrasing to camouflage the irrefutable fact that the only detriment which came, or could come, to plaintiffs would be through a wrongful default-termination. Neither claimant suffered harm from the mere threat to withhold payment; neither would have suffered the harm charged from an actual withholding, if that is all there were. The injury could only come if the Government insisted that plaintiffs continued to have obligations under the FOB contract. If, for instance, the GSA had acquiesced (after the set-off threat) in Green's abandonment of the FOB project, the denial of progress payments would not interfere with performance because there would be no further work to be done or paid for. A failure to issue a default-termination would amount to an acquiescence in abandonment. *Cf. Ling-Temco-Vought, Inc.* v. *United States*, 201 Ct. Cl. —— (Mar. 1973). Thus, it was only the defendant's insistence, via the default-termination notice, that plaintiffs continued to have obligations under the FOB contract which precipitated any of the harms alleged. That was the heart of the matter.

As in *Allied Paint Mfg. Co.* v. *United States*, 200 Ct. Cl. ——, 470 F. 2d 556 (Dec. 1972), the contractor could have attacked the termination, through an appeal to the GSBCA, on the ground that other acts of the Government (*i.e.*, the threats of set-off) excused Green's failure to proceed.[3] Another comparable case is *Nolan Bros., Inc.*, v. *United States*, 186 Ct. Cl. 602, 405 F. 2d 1250 (1969), in which we held that a convenience-termination subsumed and obviated an independent breach claim for defective design. We pointed out, in words directly applicable to the present case, "If the Government, as it might have done, had terminated the contract for default because plaintiff lagged (on account of the defective specifications) and the default was found excusable (as due to the defendant's own fault), the termination would be converted, under the default clause, into a

[3] In *Allied Paint Mfg. Co.*, as here, the contractor's position was that the default-termination was improper because wrongful acts of the GSA in the administration of other contracts adversely affected the claimant's ability to perform all of its contracts, including those terminated.

convenience-termination * * *", with the plaintiff recovering costs incurred plus a measure of profit, but not unearned profits. 186 Ct. Cl. at 607, 609–10, 405 F. 2d at 1253, 1255. Plaintiff's so-called "breach" claim has, in short, no viability independent of the validity of the default-termination, and that could be readily challenged through the "disputes" procedure.[8]

A second of claimant's positions is that the entire termination-and-disputes remedy was aborted before the default notice. In *Nolan Bros., Inc., supra*, 186 Ct. Cl. at 609 n. 5, 405 F. 2d at 1255 n. 5, we set apart "a case in which the contractor treats a government breach of warranty as ending the entire contractual relationship before the defendant attempts to exercise its right of termination." Plaintiffs say that that is what happened here—that the whole contract was effectively ended before the default-termination—but their current stance is conclusively refuted by the significant fact that USF&G undertook to complete the FOB project after the termination. If the contract was not subsisting at that time, neither Green nor USF&G would have been under any obligation; the existence of the contract was the essential predicate for the surety's agreement to complete. As in *Nolan*, we cannot see the plaintiffs had put an end to, or thought that they had put an end to, the contract before the Government invoked the default clause.

The third point is that the set-off threats constituted a cardinal change, by effectively deleting the progress payment provisions of the FOB contract, and that a cardinal change is redressable only in court, not administratively. *See Edward R. Marden Corp.* v. *United States*, 194 Ct. Cl. 799, 442 F. 2d 364 (1971). We do not agree that it is a contract change of any kind—cardinal or ordinary—for the Government to set-

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[8]Plaintiffs complain that in order to obtain relief from the FOB and Training School defaults, they would have to show that the Howard default was improper—and "only under the Howard University contract could Green obtain the threshold determination (setting aside the Howard default) which was essential to obtaining any relief" under the other two agreements. But there was nothing to prevent Green from asking the GSBCA to suspend proceedings in the FOB and Training School cases to await the Howard determination. That is a very common practice where a significant issue in one matter depends upon the resolution of another case.

off against progress payments (let alone merely threatening to set-off) a federal claim on another contract (with the same contractor) which is believed in good faith, but mistakenly, to be valid. This is simply an exercise of the established right of set-off (*see United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947); *Burlington Northern Inc.* v. *United States*, 199 Ct. Cl. , 462 F. 2d 526 (July 1972)), which is not transformed into something else because the defendant's claim turns out later to be without merit.

In any event, and assuming for argument's sake that the threats of set-off did equal a cardinal change excising the progress-payment provisions, it does not follow that such a "breach" claim would be any different from the "breach" claim in this case for simple violation of the progress-payments clause. As we have pointed out, that claim is swallowed up by the default-termination which was the event causing plaintiffs' detriment. Violation of the payments article, or even its deletion, would not have brought about the chain-of-events asserted by Green and USF&G if it were not for the default-termination. From claimants' viewpoint that was the real villain in the drama, whom they should have pursued on his own scene.

Lastly, we are told that an equitable adjustment of the convenience-termination type does not give full enough relief for the injuries suffered, and therefore plaintiffs should be allowed to seek, through this court, the part of the remedy which the administrative award cannot give them. The answer is that the premise is incorrect. "The only substantial difference between the sum calculated under" equitable adjustment or convenience-termination standards "and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits." *Nolan Bros., Inc.* v. *United States*, *supra*, 186 Ct. Cl. at 607, 405 F. 2d at 1253. This exclusion from relief of unearned profits is a settled policy which has long been accepted and enforced. 186 Ct. Cl. at 608–09, 405 F. 2d at 1254–55; *General Builders Supply Co.* v. *United States*,

supra, 187 Ct. Cl. at 485–86, 409 F. 2d at 251; *G. C. Casebolt Co* v. *United States*, *supra*, 190 Ct. Cl. at 788, 421 F. 2d at 713. And even in a common-law suit there would be no recovery for general loss of business, the claimed loss of the entire Green net worth, and losses on the non-federal work—such damages are all deemed too remote and consequential. *See Ramsey* v. *United States*, 121 Ct. Cl. 426, 433–35, 101 F. Supp. 353, 357–58 (1951), *cert. denied*, 343 U.S. 977 (1952); *Dale Constr. Co.* v. *United States*, 168 Ct. Cl. 692, 738 (1964); *Specialty Assembly & Packing Co.* v. *United States*, 174 Ct. Cl. 153, 175, 355 F. 2d 554, 567–68 (1966). The conclusion must be that the administrative remedy is, as we have already said, a full and permissible substitute for the award of damages under the former "breach" claim.

Plaintiffs err therefore in seeing themselves as under no duty to proceed administratively. On the contrary, Green should have appealed from the default-termination of the FOB contract and obtained its relief in that fashion.

B. Not unexpectedly, the defendant suggests that, having failed to appeal, Green is now barred forever. We follow, instead, the rule of *Zidell Explorations, Inc.* v. *United States*, 192 Ct. Cl. 331, 335–36, 427 F. 2d 735, 737–38 (1970), that, if the circumstances warrant, we will give a contractor who has failed to appeal a second chance. The time-limit for appeals to contract appeals boards is not beyond enlargement (*Maney Aircraft Parts, Inc.* v. *United States*, 197 Ct. Cl. 159, 453 F. 2d 1260 (1972); *Monroe M. Tapper & Associates* v. *United States*, 198 Ct. Cl. , 458 F. 2d 66 (April 1972)), and the Act of August 29, 1972, Pub. L. No. 92–415, 86 Stat. 652, gives us power to remand to a board "with such direction as it [the court] may deem proper and just."

To our mind this is a case, like *Zidell*, in which we should not rigidly hold the contractor to its original decision not to appeal. The three federal contracts were linked in plaintiff's mind and it may have considered the enlarged recovery it originally sought in the Howard administrative proceedings to be a sufficient method of covering all three determina-

tions.[4] Then, too, plaintiff may well have been misled by its view, still strenuously espoused here, that its claims are entirely "breach" claims for court trial. We referred in *Zidell* to the great confusion since *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), over which cases properly fall "under the contract" and which are for "breach". This case is a prime exemplar. Especially since plaintiffs appear to have a valid right to substantial further relief, they should not be eternally punished for their initial mistaken choice of procedure.[5] The case should go to the GSBCA for processing under the default-termination clause of the FOB contract.

c. There has, as yet, been no decision that the termination of the FOB agreement was improper, but we think that on the undisputed facts there is no doubt that it was, and we now so hold as a matter of law since the board could not validly decide otherwise. All must now accept the Howard termination as incorrect; Green was not in default on that project and the default-termination was erroneously made by the contracting officer. There were, accordingly, no liquidated damages and no excess construction costs which could properly be offset against the FOB and Training School contracts. That threats to offset were nevertheless made is undisputed and indisputable. The connection is also clear between those threats and Green's stopping work on the FOB and Training School projects. Defendant does not even hint that this stoppage was unrelated to, or had some cause other than, the menace of set-off.[6] Nor is there any suggestion that plaintiffs are mistaken when they say they warned the defendant that they would need the progress payments on the

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[4] The FOB and Training School contracts were terminated in 1966. It was not until 1968 that the GSBCA dismissed, from the Howard appeal, the claims relating to the other two contracts. By that time the time for appealing the FOB and Training School defaults had long expired.

[5] The cases in which we refused contractors a second choice—*Briscoe* v. *United States*, 194 Ct. Cl. 866, 887–88, 442 F. 2d 953, 966 (1971); *Richardson Camera Co.* v. *United States*, 199 Ct. Cl. , 467 F. 2d 491 (Oct. 1972)—presented very different facts and circumstances.

[6] The petition reproduces a letter from Green committing it to continue performance on the FOB and Training School contracts provided that GSA agreed not to offset claims unrelated to those two projects.

two contracts, without substantial diminution.[7] There is, moreover, not the slightest basis for thinking that Green should (or could) have gotten the necessary money from other sources.

It follows, we think, that Green's refusal to proceed on FOB must now be held to be excused. A serious threat in these circumstances to withhold necessary progress payments because of an erroneous off-set claim on another contract is an act of the Government, not attributable to the contractor, which excuses whatever technical default there may be. Construction contractors cannot be expected to continue working if the Government improperly holds back on substantial interim payments which enable the project to proceed. *Cf. Litchfield Mfg. Corp.* v. *United States*, 167 Ct. Cl. 604, 338 F. 2d 94 (1964); *Pigeon* v. *United States*, 27 Ct. Cl. 167, 175–76 (1892); *Overstreet* v. *United States*, 55 Ct. Cl. 154, 173–74 (1920).[8]

D. The equitable adjustment to which Green is entitled under the FOB contract includes, not only the costs it incurred itself before termination, but also USF&G's excess costs in completing the project. Defendant admits[9] that, when a default-termination is converted to a convenience-termination, the contractor is entitled to any liquidated damages and reprocurement costs paid following the termination. That would include, since the surety stands here in the contractor's place,[10] USF&G's unreimbursed excess com-

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[7] The petition sets forth a pre-termination letter from counsel for USF&G to GSA saying explicitly that "if the Government off-sets its claims arising out of the Howard University contract against funds earned by the Green Company on other contracts, the Green Company will be unable to proceed with work on the contracts not in dispute for lack of funds to pay laborers and materialmen."

[8] Green might have waited until a set-off was actually made, but the GSA's intention had been made very plain and there apparently was planning and preparation work to do which would be entirely wasted if plaintiffs were not going forward once a set-off was actually made. In the circumstances we do not think Green was compelled to await an actual set-off.

[9] See Defendant's Reply to Plaintiffs' Response In Opposition to Defendant's Motion to Dismiss, at 9 n.6.

[10] USF&G has paid all laborers and materialmen, and Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract.

pletion costs, if appropriate and reasonable. *Cf. J. D. Hedin Constr. Co.* v. *United States*, 197 Ct. Cl. 782, 790–803, 456 F. 2d 1315, 1320–27 (1972). The equitable adjustment called for by the contract is flexible enough to cover that item, to the extent the contractor has incurred such costs as a result of the wrongful termination.

On the other hand, as we have already indicated, USF&G's costs of completing the three non-federal contracts, and the loss of Green's net worth, are not proper items for an equitable adjustment under the FOB and Training School contracts.

Training School contract (*Count II*): What we have said as to the FOB contract controls the Training School agreement. USF&G was not surety for that work and the petition therefore does not ask for recovery of amounts expended by the other surety (which is not a plaintiff here). But if the other surety has a claim, through Green, with respect to completion of the Training School comparable to that of USF&G for completion of FOB, the Training School equitable adjustment should take account of it if presented.

Defendant's motion to dismiss the petition is fully granted as to Count I, but as to Count II the court makes the following disposition: (a) the petition is dismissed to the extent that a claim for "breach" of the FOB and Training School contracts, triable in court, is stated; (b) the petition is construed as alternatively seeking equitable adjustments under those two contracts;[11] and (c) the request for such equitable adjustment is remanded to the GSBCA under P.L. 92-415, this opinion, and General Order No. 3 of 1972, for appropriate administrative proceedings. Counsel for the plaintiffs is designated as the responsible reporting attorney under paragraph 9(a) of General Order No. 3.

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[11] Count II demands, in the alternative, "such other relief as the court may deem appropriate."

APPENDIX B

In the United States Court of Claims

No. 124–72

[September 28, 1973]

WILLIAM GREEN CONSTRUCTION COMPANY INC. AND UNITED STATES FIDELITY & GUARANTY COMPANY

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges.*

ORDER

This case comes before the court on plaintiffs' motion, filed June 11, 1973, for a rehearing and partial reconsideration and on defendant's motion, filed June 18, 1973, for clarification, modification and reconsideration of the court's opinion issued May 11, 1973. Upon consideration thereof, together with the responses in opposition thereto, without oral argument,

IT IS ORDERED that the slip opinion entered herein on May 11, 1973, be and the same is amended and modified in that footnote 10 appearing on page

11 of the slip opinion is stricken and deleted and the following is inserted in lieu thereof:

> Plaintiffs allege, and the defendant has not denied, that USF&G has paid all laborers and material-men. We proceed, at this stage, on that assumption. It is clear that Green is liable to USF&G for the full amount of the loss suffered in completing the FOB contract.

IT IS FURTHER ORDERED that, except for the above modification and amendment of the said slip opinion, no further modification or amendment is to be made and that plaintiffs' motion, filed June 11, 1973, and defendant's motion, filed June 18, 1973, be and the same are denied.

BY THE COURT

WILSON COWEN,
Chief Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1974